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ABSTRACT

No matter what type of insurance or how much actual coverage an individual college or university obtains, it will always pay for its own losses one way or another. This pamphlet is intended to assist colleges and universities to meet that challenge by providing administrators with a structure for analyzing and managing risks and determining the best loss prevention approach. The four sections include discussions on: (1) a general logical process for risk analysis and management; (2) the philosophical underpinnings of risk management; (3) various options for managing risks once they have been identified, including loss control, commercial insurance, and self-insurance; and (4) a "case study" of a hypothetical university's approach risk management decision process including identifying and analyzing the risk, evaluating its potential cost, and choosing appropriate loss coverage for Director's and Officer's insurance. Appended are a list of liability perils and exposures in higher education and a sample guide for an institution requesting broker qualifications and conceptual proposals. (LEE)

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Risky Business: Risk Management, Loss Prevention and Insurance Procurement for Colleges and Universities

BARBARA BENNETT

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Risky Business: Risk Management, Loss Prevention and Insurance Procurement for Colleges and Universities

Doing business generates risks which, in turn, generates business for those who specialize in risk management or who sell insurance. However, simply purchasing insurance or budgeting for a risk prevention program will not solve the problems at hand if an institution does not also have a solid commitment to loss control. No matter what type of insurance or how much actual coverage an individual college or university obtains, it will always pay for its own losses one way or another.

If uninsured or self-insured, an institution will pay for the loss when it occurs. If insured, it will pay for the loss with increased future premiums. No innovative or secret way exists to finesse this reality. Similarly, hiring additional staff—no matter how experienced or how capable—will not produce any new or magic solutions.

Most rules of good risk management, including loss prevention and insurance procurement, are but the obvious, common-sense rules that govern any exercise of judgment. The difficult issue is not determining what to do, but setting about to do it; for institutions of higher education, overcoming this difficulty is often a particular challenge.

This pamphlet, therefore, is intended to assist colleges and universities to meet that challenge by providing a structure for analyzing and managing risks, and for determining the most responsible loss prevention approach for a given college or university. Section I describes generally a logical process for risk analysis and management; Section II discusses the philosophical underpinnings of risk management in the college or university setting; Section III outlines in more detail various options for managing risks once they have been identified, including loss control, commercial insurance, and self-insurance; and Section IV

utilizes a "Case Study" approach for a risk management decision concerning Director's and Officer's liability.

I. The Risk Management Process

The textbook risk management process involves four stages: 1) identification of risk (what losses are possible?), 2) evaluation of the exposure (how much will it cost?), 3) choice of one or more management tools (what is the best way to minimize and pay for the loss?) and 4) implementation with periodic review (getting the job done).

A risk is any uncertainty of outcome. A risk may be "pure" or "speculative." A pure risk carries no potential gain and results in either a loss or no loss, such as the risk of property damage. For example, the risk of fire exists with no potential gain, and during a certain period of time that risk will either result in a loss or it won't. A speculative risk, on the other hand, results in a loss, no loss *or* a gain, such as an investment risk. Traditionally, institutions insure only pure risks.

A risk may also be either "static" or "dynamic." A static risk is one that is statistically constant in the aggregate, such as the occurrence of three deaths for every one million hysterectomies performed. A dynamic risk arises from change itself, such as risks created by environmental legislation. Only static risk is predictable and thus well-suited to traditional insurance coverage (which is based on statistics). Commercial insurance for dynamic risks is often unavailable or, if available, is usually extremely expensive.

Identification of Risk

The *first stage* of risk management is the identification of the institution's pure risks, both static and dynamic. A university may discover and identify its static risks by use of checklists, personal inspection of premises, legal audits, or a review of policies and procedures. The discovery and identification of dynamic risks require anticipation, education, and creative analysis (for example, the identification of AIDS exposure liability). The process further-

more is often aided by an examination of state and federal law, as well as by the use of consultants, such as in the commissioning of an independent asbestos survey.

A checklist of potential institutional liabilities summarized from Adams and Hall, "Legal Liabilities in Higher Education: Their Scope and Management," 3 *Journal of College and University Law* 217, 256–57 (1976), is contained in Appendix A to this pamphlet. All colleges and universities would be well-advised to develop a similar list, and to review and update it annually.

Evaluation of Exposure

The *second stage* of risk management is the evaluation of the potential economic impact of the identified risks. This step involves calculating the frequency and severity of each type of potential loss, and comparing the potential cost of those losses with the financial structure of the organization.

For example, institutional history may show that medical center professional liability claims for the past ten years have remained constant in number and that the cost of those claims has risen steadily each year by approximately 15%, but that claims experience has averaged 80% of published insurance industry averages. The institution can estimate its losses for the upcoming year in two ways.

First, it can take the last calculated loss (which will probably be several years back because of the lag time in claims reporting and resolution), add to it 15% for each year up to the current year, and then add the total amount to the last loss. Second, it can look to industry predictions and multiply (in this instance, by 80%) the published average insurance industry loss predictions for the coming year. A comparison of these two figures will give the institution a feel for the financial shock it may be forced to bear in the coming year, and will enable it to better judge how to insure or fund the loss while still maintaining operations.

Such a process works particularly well for static risks, but not so well for dynamic ones.

because statistics for the latter generally are not available and frequency is unpredictable. For static risks this step may sometimes involve complex loss history statistics, such as for medical professional liability risks (as discussed above), but other times may involve only simple observations, such as for risk of flooding.

In each instance, an institution needs to determine not only the minimum level of operation that must be maintained in the event of a loss, but also the resources necessary to enable it to maintain that minimum level in case of a loss. If the loss will not affect significantly an institution's operations, as is the case with most losses, the question is simply how great a financial shock the institution is willing to risk, and how much it is willing to invest financially to minimize or avoid that shock. Thus, in the university setting, even though policy considerations may outweigh financial ones for many risks, such as research using the AIDS virus, financial analysis is important so that the final decision is a fully-informed one.

Selection of Risk Management Tools

The *third stage* in the risk management process is the selection of one or more management tools to use in treating each risk of loss. These tools include: 1) avoidance or elimination of the risk; 2) loss control; 3) retention of the risk; and 4) transfer of the risk. One of these methods, or several in combination, may work best for an institution's risk management program. So many potential losses exist within a university that it is impossible to analyze and choose a treatment method for each, and to then evaluate that decision on an annual or biannual basis. Consequently, an institution may want to first concentrate on its most significant risks. The selection of specific risk management tools will be discussed in greater detail in Section III of this pamphlet.

Implementation and Review

The *fourth stage* of the risk management process is the implementation of the treatment method or methods selected and the periodic

review of those selections. This is the most difficult step to accomplish within the university setting, yet it is the most crucial to successful risk management. Moreover, because the nature of risks—and the facts and law on which risk management decisions are based—change continually, careful periodic review of all decisions, procedures, reports and relationships is essential to continued success.

II. Philosophical Underpinnings of Risk Management

The two extremes on the risk management continuum can be described as "No Guts, No Glory" and "Better Safe Than Sorry." "No Guts, No Glory" is actually an absence of risk management, or a decision on the part of an institution that it will risk everything and go for broke. The result in the short run can be either delightful or devastating. It is possible to purchase only one lottery ticket and win the lottery—once. Over time, devastation becomes a certainty. Lottery winners rarely repeat.

Risk management overkill is no better. A one-sided "Better Safe Than Sorry" approach likewise defeats the purpose of risk management because to protect fully against every possible loss would paralyze and/or bankrupt even the soundest of institutions. Buying every ticket in the lottery may assure a win, but after taxes and expenses of administration, it is a hollow and costly victory. In order to minimize cost and controls, yet maximize protection, an institution must achieve a delicate balance between "Better Safe Than Sorry" and "No Guts, No Glory."

This very nature of risk management is often the antithesis of the fundamental philosophies that underlie the missions of colleges and universities. The decentralized collegial nature of educational institutions makes it difficult not only to evaluate risks, but also to implement policies to minimize those risks. The strategic plans of most colleges and universities are based on growth and innovation which, in turn, necessitate risk. (Ben Franklin's principle that "they that can give up essential liberty to obtain a little temporary safety

deserve neither liberty nor safety" could be the torchsong of academicians.)

This philosophy, however, is inconsistent with much of the focus of risk management, which requires anticipation of a worst case scenario, and protection against its occurrence. It is painful to face all existing risks and still take the responsibility for managing those risks even without the philosophical conflicts inherent to a college or university. That the risk management balance is especially delicate at educational institutions makes the senior administrators' commitment to a good risk management program that much more crucial.

III. Risk Management Treatment Methods

An institution has four options for handling a risk: avoidance, control, retention, and transfer. Avoiding or controlling losses are the most effective and least costly treatment methods, yet institutions find them the most difficult to implement because they involve changes in behavior. Retaining or transferring losses, on the other hand, are the least effective treatments, and take the least amount of time and effort since both involve merely paying for the loss. In many cases a combination of these methods works best. In all cases the choice should be by conscious decision.

1. Avoidance

Some activities generate risks of loss that far outweigh the importance of the activity; consequently, it may be worthwhile avoiding such activities in order to eliminate both the risks and the potential loss. Two possible examples are use of personal aircraft by employees while conducting university business and cheerleading pyramids. Some institutions have made a policy decision to prohibit one or both of these activities. Similarly, if the institutional benefits to be gained by other such activities do not outweigh substantially the potential losses, serious consideration should be given to eliminating those as well.

Obviously, complete avoidance of risk is the least expensive and most successful treatment method. Yet, while it is an option that

should never be overlooked, it is rarely the appropriate option of choice.

2. Control

Loss control is the heart of risk management, and the only realistic way to reduce its cost while continuing to do business. Commercial insurance is simply a method for amortizing the costs an institution incurs for its own losses. Loss control may actually eliminate or at the very least minimize those losses.

Ironically, loss control is often neglected. Many institutions tend to shrug their collective shoulders and complain about the cost of insurance rather than take responsibility for controlling the losses that require the insurance and drive up its premiums.

A successful loss control program requires a commitment by the senior administration at its very highest level—a commitment often easy to delay because its benefits are long-term and intangible. Controlling losses, especially at a time when losses are increasing annually, is not a benefit that an institution can immediately see, touch, or point to with pride to legislators, its board of trustees, or potential faculty and students. Nevertheless, this absence of immediate reinforcement must not deter an institution from implementing a sound loss control program.

Educational institutions often incur liability as employers. The risk of labor-related losses can be reduced by 1) implementing comprehensive training programs for supervisors, 2) drafting legally-sound policies and procedures that are publicized and enforced, and 3) providing a mechanism for early reporting of potential problems. For example, many institutions provide for progressive discipline of employees, yet supervisors often allow potential problems to worsen without putting any documentation in an employee's file. Furthermore, the application of discipline may differ from supervisor to supervisor. Training programs that provide consistent guidelines and which also educate supervisors about effective ways to administer discipline can help minimize claims. To be successful, these methods require the cooperation and commitment of all

segments of the institution, which in turn requires the mandate of the administration at the highest level.

Claims against an institution for personal injury or property damage may be reduced by centralized and consistent claims management. Establishment of a central office for receipt of all incidents and accident reports, statistical analysis of past reports, and policies concerning the conduct of immediate investigations, including recorded statements of witnesses, are included in good claims management procedures. Institutional guidelines for evaluation, valuation, and settlement of claims, including policy determinations on nuisance claims, are also effective in reducing losses.

Other loss control techniques include: 1) contract supervision and use of standardized forms; 2) routine maintenance and inspection of the physical plant; 3) inventory of property, including estimated values; 4) security procedures, including frequent review; 5) rules and regulations on the use of university facilities by outside groups, including requiring a certification of insurance with appropriate coverage, meeting with representatives from sponsoring organizations before major campus events to discuss policies and procedures, and maintaining control of all set-up and security; and 6) implementation of special policies and procedures for the activities of university-affiliated groups off-campus, including requiring sufficient insurance coverage for on- and off-campus activity of all faculty and staff, obtaining sufficient releases of liability from involved parties, and considering contractual provisions if insurance is inadequate and potential liability is large.

Even a strong loss control program will not be able to eliminate all risk. An institution can prohibit cheerleading pyramids, for example, and institute specific guidelines for allowable cheerleading activities; but if any cheerleading exists at all, there will nevertheless be accompanying risks of loss and liability—and the institution must deal with those remaining risks.

After risks are identified and loss control procedures are put in place to minimize those risks, an institution must then decide whether to retain or transfer the remaining risk of loss. Often an institution is forced to retain the remaining loss because either no outside entity is willing to assume the risk or the cost of transferring it is prohibitive. Nevertheless, for some losses, commercial insurance or a group captive allows the transfer or sharing of the risk on an effective and cost-efficient basis.

3. Transfer

The most common method employed by colleges and universities for transferring a risk of loss is to purchase commercial insurance coverage. Ambrose Bierce in the Devil's Dictionary defines insurance as "an ingenious modern game of chance in which the player is permitted to enjoy the comfortable conviction that he is beating the man who keeps the table." Indeed, over time commercial insurance will not save money. A large unexpected loss will, for future years, simply push an institution's premium to the point that the institution will eventually pay for the loss anyway. On the other hand, insurance can amortize the cost of a loss, and give an institution at least a momentary feeling of comfort.

Unfortunately, affordable commercial insurance is generally available only for the types of risks that have a high loss frequency and a low severity (such as auto liability claims and property damage claims) because these risks are easily predicted. The high frequency provides statistics for predicting occurrence, and the low severity minimizes the impact of any errors in that prediction. Those risks with low frequency and high severity, such as environmental claims and antitrust violations, are the most difficult to handle; as a result, the institution is often left with the problem of adequately retaining and protecting itself against these losses (e.g. obtaining insurance coverage for them).

Sometimes retention is the best choice, such as with a decision to retain the risk of loss of property of little value. Sometimes reten-

tion is the *only* choice, such as with the risk of certain environmental claims. Often, a combination of methods is most effective, with an institution retaining a portion of the risk, and transferring the excess. This, in effect, is what occurs with a traditional commercial insurance policy that carries a substantial deductible.

An important consideration in today's sophisticated insurance market is broker selection. Appendix B consists of sample forms and considerations for the broker selection process. The current insurance market is sufficiently limited that the best course of action probably is to bid a broker rather than specific insurance coverage. Nevertheless, policy interpretation issues and the drafting of manuscript policies are areas for legal input and institutional concern, and these areas should not be delegated completely to the broker. In addition, any broker should be required to provide the institution with quarterly reports, predictions for renewal terms, and justification for its fees, the latter of which are often negotiable.

Outside captives, risk pools and risk retention groups are all alternatives to traditional commercial insurance. Each spreads the risk of loss, which results in simply stabilizing the cost of losses rather than reducing them. In addition, captives, pools and risk retention groups are good choices when protecting a risk that is substantial enough to justify the complexities inherent in forming or joining one of these entities. Areas that are highly cyclical in the commercial market, such as medical malpractice, and for which an institution has a better-than-average loss record, are often good candidates for captive or risk pool participation.

Participation in a captive or pool includes a consideration of complex legal issues concerning: the drafting of documents, the administration of the entity, the legal relationships between the participants, and the tax consequences for both the entity and the participants. Philosophical considerations are also important, such as whether a captive will build surplus and operate as an investment, or re-

fund surplus and operate only as an insurance substitute, or whether the captive will operate its own umbrella risk management mechanism, or act simply as an insurance company and leave all risk management to the individual participants. Counsel should not only be consulted in these deliberations, but should participate actively from the beginning in all the decisions.

4. Retention

Finally, an institution is left with the risks of loss that exist despite good loss control, that result from activities too important to avoid, and for which commercial insurance is either too expensive or unavailable. The temptation is to ignore these risks because often there seems no other solution. However, to be responsible, an institution must acknowledge that it is "retaining" or "self-insuring" these losses.

In the best of all worlds, an institution should establish a formal self-insurance trust or other internal funding mechanism for anticipated losses. At minimum, there should be a conscious decision made in advance of the loss concerning which budget or account will bear the expense of that loss. For example, an institution may decide to retain the risk of loss for worker compensation claims and set up a central fund to self-insure those claims, or it may decide instead that each department will bear the losses attributable to the claims of its own employees.

5. Cost

The cost of commercial insurance, retention or self-insurance, and pools or captives often is the same over time, the only significant difference being the predictability of that cost. One advantage of retention, self-insurance or a wholly-owned captive over commercial insurance is that, while the funds budgeted for loss are segregated, they still belong to the institution. If a university practices sound risk management and its loss record is good, savings may result over time because the funds are not used to pay some other entity's losses, as is often the case with commercial insurance.

The danger is that a big loss will occur during the early years when internal contingency funds are not large enough to absorb it. Often, however, the severe loss incident is discovered long before any cash settlement or judgment must be paid, and the actual financial impact subsequently can be spread out over time.

With commercial insurance or other outside insurer, contributions and premiums are lost forever regardless of an institution's loss record. On the other hand, premiums may be lower if an institution's loss record is good, and it is protected from early devastating losses (although, with such losses, premiums will invariably rise quickly to reflect any negative institutional history).

IV. Case Study: Alpha University Director's and Officer's Liability

This section addresses a hypothetical university risk management decision, and explains each step in the process of identifying and analyzing the risk, evaluating its potential cost, and choosing appropriate loss coverage.

Overview

Alpha University, a private university with 12,000 students and 9,500 employees, including its medical center staff, is faced with a risk management decision concerning liability coverage for its trustees and officers. In the past, Alpha has purchased its Director's and Officer's insurance from a commercial carrier. This year, however, coverage premiums have increased substantially, as have the deductibles, and the exclusions seem to be broadening. Alpha, therefore, has decided to reconsider its treatment of director and officer risks.

By following the analysis described in this pamphlet, Alpha will identify its risk of loss for director and officer activity by requesting its legal counsel to evaluate potential areas of liability. The university then will estimate the cost of that liability, and compare it to the cost and coverage provided by commercial insurance, before choosing an appropriate method for handling the risk.

Facts

The best commercial Director's and Officer's insurance available to Alpha will provide $10,000,000 in coverage subject to a $100,000 deductible. The premium is $76,000, and principal exclusions include: claims of the insured organization against other insureds, ERISA claims, environmental claims, libel and slander, acts of deliberate dishonesty, antitrust actions, and punitive damages. (Some of these excluded claims are covered under other university insurance policies.) Included claims are those state law claims concerning breach of fiduciary duty, labor law and civil rights claims, securities claims, and intellectual property claims. In addition, the policy will cover only Alpha's directors and officers; it will not provide protection for other supervisory or administrative staff.

Under the applicable state law, all directors and trustees of certain not-for-profit corporations, including 501(c) (3) organizations, are immune from suit arising from conduct of the affairs of the corporation except when such conduct amounts to willful, wanton, or gross negligence. Also under relevant state law, a not-for-profit corporation is empowered in defined circumstances to indemnify trustees and officers for liability and defense costs arising out of their service on behalf of the corporation.

A director or officer is entitled to indemnification if he or she is wholly successful on the merits of the defense of any proceedings; if he or she is not wholly successful, indemnification can be provided by the corporation only if specifically authorized in each case by the board according to a statutory procedure. There need not be any standing commitment by the corporation to indemnify.

1. Identification and Evaluation of Exposure

Research and analysis by Alpha University counsel reveal that claims of personal liability against directors' and officers' corporations fall loosely into two main categories:

1. Claims arising out of an alleged breach of a

director's fiduciary duty brought by, or on behalf of, the corporation by those who fund it (e.g., donors), those who benefit from it (e.g., students), and those who serve it (e.g., co-directors). These types of claims are state law claims, and include conflict of interest, self-benefit at the expense of the corporation, mismanagement and non-management; and

2. Claims brought by third parties (including the government and employees), based generally on tort, or breach of contract, and governmental enforcement actions, such as violation of the federal tax laws or violation of state corporation laws. These types of claims are a mix of federal and state causes of action, and include violations of antitrust laws, civil rights statutes, other labor laws, environmental statutes, and securities laws.

Based on this general analysis, Alpha's counsel determines that the most likely exposure for the university's trustees is breach of fiduciary duty for decisions concerning financial and investment matters. Counsel also reasons that the state immunity statute will protect Alpha's trustees against state law causes of action short of willful, wanton or grossly negligent conduct, but that it will not provide protection for federal claims.

The 1982 Wyatt Survey[1] found that claims against directors and officers of not-for-profit corporations most often concerned unlawful labor practices, sexual harassment and discrimination, and breach of contract. The common law tort and breach of contract claims in this category are state law claims. The remaining causes of action are authorized by federal statute and, in virtually all of these federal claims, director and officer liability attaches only if there existed some authorization of, supervision of, or participation in the alleged illegal acts by the director or officer.

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1. *1982 Comprehensive Report Directors and Officers Liability/Fiduciary Liability*. Chicago, Illinois: The Wyatt Company, 1982.

2. Financial Impact of Losses

Given the broad coverage afforded by state law immunity, the financial impact on Alpha University for indemnifying its directors and officers for liability, in most likelihood, would not be devastating. The only claims covered by insurance which would *not* fall under the immunity statute would be civil rights and other employment law claims, securities law claims, and intellectual property claims. Of these, the most likely to occur are employment-related claims.

The largest economic liability from employment-related claims generally result from back pay, double damages under the ADEA, and emotional distress damages under Section 1981. Of these, only emotional damages are recoverable under a typical Director's and Officer's insurance policy (the others, like those mentioned earlier, are covered under other university insurance policies). Given this small benefit, the cost of Alpha's policy and the size of its deductible, traditional insurance coverage may not be the best choice for Alpha University.

The 1933 Securities Act stipulates that a director or officer is responsible for controlling his or her personal liability for all violations, but is excused if he or she had no knowledge of or reason to believe in the existence of the facts upon which the liability was founded. Liability under the trademark and copyright laws furthermore requires some participation in or knowledge of the violation on the part of the director or officer. It is unlikely that the trustees of Alpha University will face liability in these areas. The cost, therefore, of any such claims would be mostly the cost of defense which, in turn, would most likely be offset by the large (e.g., $100,000) deductible in the policy.

3. Treatment

Following a financial evaluation of available commercial insurance, which indicates that traditional coverage may not be Alpha's best option, the university is left to consider other forms of risk management. Obviously, the

university will not be able to totally eliminate its director and officer exposure; consequently, loss control becomes even more crucial.

Alpha furthermore determines that, because it is not aware of any appropriate captives or risk pools, some funding mechanism to cover legal fees and any resulting liability, along with an aggressive loss control program, would be the most responsible way to handle the remaining risk.

4. Implementation

Alpha decides, therefore, to put into a trust fund the $76,000 that it would have otherwise paid for the insurance coverage, and to set this amount aside each year to use in defending any director's and officer's claim. The University realizes that further funding may be desirable and/or necessary, and it will consult with its broker and/or an actuary for advice as to the appropriate amounts for various levels of protection. The university also intends to investigate any existing captives or pools, and to compare their coverage with that of the rejected policy.

Some loss control measures which Alpha decides to institute include the following:

1. Conduct a legal audit of the governing board, including an audit of documents of incorporation, statutory authorization, charter, bylaws and state constitutional authority; preparation and maintenance of minutes for all Board meetings, along with a collection of Board resolutions and policies; an examination of voting procedures, election of officers, and other procedural rules; examination of the appropriate conflict of interest policy and its application to the Board; an examination of the role of the Board in the day-to-day activities of the university; a review of the defense and indemnification of the trustees and officers by the university, and the procedure by which these decisions are made; and an examination of the role of legal counsel at Board meetings.
2. Encourage university counsel to inform trustees of their obligations and fiduciary

duties, and to educate them on all issues in which they have a voice. The Board should also be given the facts about director and officer coverage, as well as the opportunity to vote on whether Counsel's recommendation concerning risk retention be adopted.

3. Insulate the entire board as much as possible from decisions that carry potential liability. Such decisions might instead be delegated to various board committees with which counsel can work closely to ensure that the voting members are informed.
4. Work for legislation which would further protect not-for-profit trustees, and encourage enactment of provisions allowing blanket policies of indemnification to the fullest extent possible.

Alpha University's decision in this hypothetical, to cancel its commercial Director's and Officer's liability insurance coverage and increase its loss control procedures, combined with the retention of the risk, may not be the best decision for another institution. In particular, the hypothetical concerns a large, private institution, and the conclusions that were made may be inappropriate for a public university, a community college, a large, multi-campus institution, or for that matter, a smaller private college. Nevertheless, the hypothetical follows an analytical approach to the problem which could result in financial savings to the institution, as well as increased protection for trustees.

Conclusion

Loss control is the most successful and cost-effective tool for managing an institution's risks. As such, it requires a commitment and mandate from the senior administration at its highest level. Because colleges and universities will always ultimately pay for their losses one way or another, be it through commercial insurance or self-insurance, the most effective method to stay the ever-increasing tide of liability is to make the commitment to reducing losses.

It has been the intention of this pamphlet

to delineate the various insurance options available to colleges and universities, and to provide a structure that will simplify the process required for effective and informed risk management and insurance procurement decision-making. As demonstrated with the Alpha University hypothetical, an institution can gain control of its losses, while at the same time instituting loss control measures to reduce the occurrence of those losses, if it will: 1) take the time to methodically identify its risks; 2) estimate the cost of potential losses; and 3) weigh that cost against the cost of different risk management treatment methods. The process may be tedious and time-consuming at the outset, but it should ultimately make doing business a little less risky.

A list of additional resources on Risk Management is available free of charge from NACUA's Legal Reference Service. Please write or call NACUA, One Dupont Circle, N.W., Suite 620, Washington, D.C. 20036, (202) 833-8390.

Appendix A: Selected Higher Education Liability Perils and Exposures Classified by Type of Action

1. Criminal Acts

Embezzlement—employee dishonesty
Environmental—pollution
Malfeasance—employee and/or directors
Manslaughter—campus security

2. Tort (Civil) and Equity Acts

Advertisers', authors', and publishers' liability (books, papers, monographs, solicitations, broadcasters, etc.)
Athletic events (player, spectator, coach)
  Recreational facilities, programs
  Instructional
  Intercollegiate contests (events)
Automobile (including mobile equipment)
  Fleet, drivers, and non-ownership operation
Aviation liability
Bailee liability (care, custody, and control)
Boiler and machinery liability
Campus security—normal operations, false arrest, and all related intentional torts, etc.
Construction liability (contractor, students, public, donor, board)
Dental malpractice—products and services
Directors and officers (errors and omissions)
Discrimination
Easements and other property liability—access, appurtenances, etc.
Ownership liability; rights of others, e.g., eminent domain
Elevators, escalators, including collision liability
Employers, including safety and health hazards; Worker's Compensation, Federal Employment Liability Act, Longshoremen and Harbor Workers, Jones Act, Unemployment Compensation, Discrimination (civil damages)
Fire—legal liability
Fringe benefits and employee benefits
Hold Harmless or waiver agreements; consents, travel forms, etc.
Institutional agency—employees, invitees, licensees, trespassers, volunteers, etc.
Libel—slander, defamation of character, invasion of privacy, etc.
Liquor law liability
Malpractice—errors and omissions; negligence
  Medical doctors, dentists, nurses, specialists, pharmacists, paramedics, hospital personnel

Veterinary medical personnel (institutional personal)
Clinical practicum, psychological conditioning, counseling
Audio—speech centers, personnel, etc.
Nuclear liability—products and general
Oceanography—maritime liabilities
Pharmaceutical liability
Pollution—environmental hazards
Premises and operations
Professional liability, errors, omissions, negligence (ordinary and gross) (administrative and professional discipline personnel)
Product liability—food service, medical products (blood, prosthetics, etc.)
Program liability—travel, research (foreign and domestic)
Protective liability—(contractual in large measure)
Residence liability (OLT)
Riot, civil commotion
Watercraft
Worldwide premises and program liability

3. Contractual Acts

Artifacts, art objects (bailee, exhibitor, etc.)
Authority operations
Equipment
Franchise operations
Implied contracts, e.g., catalogs
Joint—e.g., affiliation agreements
Products and services
Professional services
Real estate—leasehold operations
Staff—fringe benefits, tenure, etc.

4. Liability under Special Regulations

Environmental—e.g., CERCLA, SARA, right-to-know statutes
ERISA
Indirect Cost
Tax
Medicare and Medicaid

Appendix B:
Request for Broker Qualifications and Conceptual Proposals

Alpha University is in the process of evaluating brokers for the placement of its property and casualty insurance and receiving recommendations on the improvement of these coverages. Your firm is one of the insurance organizations from which qualifications and proposals is being requested.

Alpha University is interested in receiving a proposal from your firm outlining:

1. Your firm's qualifications to handle the property and casualty program of Alpha University.
2. The alternatives you believe Alpha should explore in improving its program.

Two copies of your response must be submitted no later than 4:00 p.m. on February 27, 1990, to:

_____

_____

_____

_____

Following the receipt of responses, your proposal will be thoroughly evaluated and you may be invited to an oral interview. Following the interviews, the broker to market the program will be selected. The broker will be expected to take the primary role in developing insurance specifications.

The major portion of the current insurance program has an expiration date of August 1, 1990. At this time, you are not authorized to approach insurers on the behalf of Alpha University. Doing so could be grounds for disqualifying your firm from further consideration. At the appropriate time, the selected firm will be supplied with a broker of record letter with the existing insurers.

The planned schedule of important dates for the marketing process:

	Activity	*Target Date*
1.	Qualifications and proposals received from firms	February 27, 1990
2.	Interviews with selected firms	March 16, 1990
3.	Selection of broker for marketing program	March 27, 1990
4.	Specifications and applications to be completed by selected broker	May 15, 1990
5.	Major portion of insurance program becomes effective	August 1, 1990

Inquiries regarding this request should be directed to the contact person listed above.

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I. Written Qualifications

This section contains questions which will assist Alpha University in determining your firm's capabilities and interest in the property and casualty insurance needs of Alpha.

The quality of the written presentation is important. Please organize your replies to the following and be clear and concise.

1. Provide a brief history and description of your firm. This includes the size (number of employees and/or revenues) and areas of specialization. Provide the same information for the office which would handle the account.
2. If available, include a copy of your latest annual report or comparable document.
3. Provide the names and experience of each individual that would be assigned to work on the account. This should include account executives, marketing personnel, technical representatives and others that would be actively involved. Identify the individual within your firm who would have overall responsibility and identify the office in which each account member is located.
4. Provide the names, addresses and telephone numbers of at least three references. Preference is for local references and institutions of higher education.
5. Describe your firm's ability to assist Alpha University in proving a difficult claim with insurers.
6. Describe any special expertise your firm has in providing insurance to institutions of higher education.
7. Describe the process you would employ to keep abreast of Alpha's loss exposures.
8. Comment on the importance your firm would place on the handling of the Alpha account, including any statements on the general relationship.
9. Alpha currently has a working arrangement with a risk management consultant. Describe the feelings of your firm in working with the consultant and your thoughts on the continuance for such.
10. a. Describe how you desire to be compensated—fees or commissions. Alpha currently prefers a fee basis. If you propose a fee, how does your firm propose to determine the level of the fee?

    b. Does your firm have any reservations in making available documentation of normal commissions which it received from insurers?

II. Insurance Proposal

A. General Information. Alpha University has a wide range of exposures to loss, some of which are ascertainable from the types of policies currently carried. It has recently installed a loss prevention program which has the active support of the Administration of Alpha and a loss control officer is on staff. Due to its size, Alpha's staff lacks a high degree of sophistication as to insurance matters and must rely on the knowledge and expertise of its insurance broker.

B. Insurance Companies. The key to marketing insurance for institutions of higher education today is the availability of commercial insurance markets. Many insurers refuse to provide such insurance. In your proposal list insurers with which you have a contractual arrangement as well as those carriers to which your firm has access through a brokerage arrangement.

C. Conceptual Approach. It is recognized your firm may have little knowledge of the loss exposures of Alpha. Your proposal is expected to be in generalities but should demonstrate the intent of your firm to acquaint itself with the loss exposures, the plight of commercial insurance for institutions of higher education, the financial ability of Alpha to bear the expense of adequate coverage and any other information your firm deems pertinent.

D. Marketing Process. This request contains the planned schedule of activities. Working within that schedule, or with changes you feel necessary, present the plan of action your firm would follow to market the insurance program of Alpha University.

III. Checklist for Interviewing Prospective Brokers

Broker _____

A. Brief Description of Brokerage Firm

1. Introduction of personnel.
2. Background of personnel to work on account.
3. Brief description of related experience.

B. Marketing

1. Discuss knowledge of insurance market available for institutions of higher education.
2. Discuss the probable or recommended retentions for Alpha University.
3. Describe your marketing process.
4. What is your approach to pricing?
5. What is the minimum Best Key Rating your firm would recommend?

C. Loss Prevention

1. Describe the scope of services available from

your firm and the additional cost, if any.

2. Describe how your firm would work with insurers on loss control.

D. Claim Control

1. Describe your firm's ability to assist Alpha with the settlement of claims, especially difficult or unusual claims.
2. Describe frequency and extent of claims reports to Alpha University.

E. Other Specialized Services

1. Will your firm provide an annual activity report?
2. If necessary, can your firm provide statistical reports or actuarial services?
3. Do you have the capacity to assist with the development of insurance and indemnity requirements for vendors and contractors?
4. Describe other services you can provide.
5. Describe your desire to service the Alpha account.
6. Describe your feelings on an outside consultant and the continued need for Alpha.

F. Compensation

1. Describe how you prefer to be compensated.
2. Describe how the amount of compensation would be determined.
3. Based on your current knowledge of needs of Alpha and the amount of the current insurance costs, what do you feel would be a ballpark figure as to total compensation?
4. Do you have any reservations in sharing with Alpha the commission statements from insurers?

NOTE: Comments on general attitude: _____

_____

_____

_____

_____

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IV. Evaluation Criteria and Rating of Oral Interviews

Broker _____

Category	*Checklist Items*	*Points Available*	*Score*
1. Depth of experience of account team	A-2,3	10	____
2. Broker's knowledge of coverage availability for institutions of higher education	B-1	10	____
3. Use of retentions	B-2	5	____
4. Marketing process	B-3	10	____
5. Pricing approach	B-4	5	____
6. Evaluation of broker's comments on financially sound insurers	B-5	5	____
7. Evaluation of value of available loss prevention services	C-1,2	10	____
8. Evaluation of value of available claims assistance	D-1,2	10	____
9. Evaluation of value of other services	E-1,2,3,4	10	____
10. Desire and enthusiasm over the prospects of servicing the Alpha account and ability to work with outside consultant	E-5,6	10	____
11. Reasonableness of amount and approach to determining remuneration	F-1,2	5	____
12. Approach to making available commission information from insurers.	F-3	5	____
13. General attitude	General	5	____
Total:		100	____

Positive or negative comments not subject to scoring:

_____

_____

_____

_____

_____

Evaluator _____ 28 _____

Also Available from NACUA

Crime on Campus: Institutional Tort Liability for the Criminal Acts of Third Parties, by Anita Raddatz. $6.00 each prepaid.

Complying with "Drug-Free Workplace" Laws on College and University Campuses, by Lawrence White. $6.50 each prepaid.

College and University Student Records: A Legal Compendium, edited by Joan E. Van Tol. $25.00 each prepaid.

Sexual Harassment on Campus: A Legal Compendium (Second Edition), edited by Elsa Kircher Cole. Available June 1990.

Am I Liable?: Faculty, Staff and Institutional Liability in the College and University Setting. $25.00 each prepaid.

Student Legal Issues, selected articles from *The Journal of College and University Law*, edited by Elsa Kircher Cole and Barbara L. Shiels. $19.50 each prepaid.

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